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The Theory and Practice of Constitutionalism in Pre-Revolutionary Massachusetts Bay: James Otis on the Writs of Assistance, 1761

*David Thomas Konig**

The subject of constitutionalism is of considerable topical importance in Canada today, and it is hoped that this essay in historical jurisprudence will be of value to Canadian scholars attempting to discover a usable past in the eighteenth century constitution of Empire.

To plunge twentieth century scholars into the eighteenth century legal world, however, may have a tortious quality to it. Recently, an American scholar commented rather grimly that much modern scholarship on the subject shares "a sense of the strangeness of the eighteenth-century world, its pervasive differentness from the legal world we know and have internalized. We cannot," he concluded, "with any expectation of success pretend to be a judge in a court in provincial America. . . ."[1] We can, perhaps, pretend to be a student or practitioner in provincial America, for the texts from which provincial American lawyers learned the law are well known and accessible, and their minutes of cases are often also available. The published *Diary and Autobiography* of John Adams reveals his own attempts to master the subject in the following recitation of sources:

> Wood. Coke. 2 Vols. Lillies Ab[ridgemen]t. 2 Vols. Salk[eld's] Rep[orts]. Swinburne. Hawkins Pleas of the Crown. Fortescue. Fitzgibbons. Ten Volumes in folio I read at Worcester, quite thro.'

Adams also read Justinian, Finch, Hale, "and some Reporters, Cases in Chancery, Andrews, &c." Yet the result was neither coherent nor easily assimilated. "All this series of Reading," he confessed in 1760, two years after passing the bar and commencing his practice, "has left but faint impressions, and [a] very Imperfect system of law in my Head."[2]

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1. H. Hartog, "Distancing Oneself from the Eighteenth Century," in *Law in the American Revolution and the Revolution in the Law*, ed. H. Hartog (New York, 1981), pp. 256–257.
2. L. Butterfield, ed., *Diary and Autobiography of John Adams*, 4 vols. (Cambridge, Mass., 1962), 1:173–174 [hereinafter Adams, *Diary*].

Such a "system" would eventually emerge in his belaboured head after several more years of practice, for any "system" that existed in provincial law could not be easily codified or articulated. The reason was not, however, that there existed "a peculiar confusion in the American mind about the nature of law," nor that American law was "confused and chaotic."[3] Rather, the "system" of provincial American law was less a manageable body of principles that could be studied and assimilated than it was a framework of procedural arrangements within various institutional settings. As such, it was not obscure; on the contrary, such procedures and institutional arrangements were well known to those who participated in the legal and political systems of Massachusetts Bay. In fact, it was as unnecessary as it was impossible to codify or articulate the general contours of provincial law. Deeply held and based on essentially unspoken assumptions about the "nature of law," they could remain unarticulated precisely because they were so widely and implicitly shared. To Adams, who by 1770 had had enough acquaintance with the legal system to be less confused than the neophyte lawyer of a decade earlier, virtually all cases before the Massachusetts Bay courts were implicitly understood by common jurors. Perhaps one case in a thousand "would confound a common Jury," he admitted, but in all others,

> The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors. The great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton—it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air.[4]

Adams was not making this point to defend any substantive doctrine in law, but to assert the right of a jury to return a general verdict and to find against the instructions of the court. As such, his argument—which was, despite his protestations, rather "extravagant"—concerned a procedure that he felt was essential to "our Constitution of civil Government." Such a power of the jury was thus a constitutional principle, in the sense that the free jury was one of several institutions that "constitute" the government. Together with "the Power of the People in Legislation," the popular power of the jury to act "in the Execution of Lawes" was essential to protecting British liberties against the encroachments of power.[5]

To eighteenth century Americans this restraint of centralized,

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3. G. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, 1969), pp. 292, 295.
4. Adams, *Diary, supra,* note 2, vol. 2, p. 5.
5. *Id.*, p. 3.

concentrated power was the central issue in constitutionalism. Since the 1960s the historical literature on this struggle between power and liberty has taken some long strides forward. Beginning in 1965, when Bernard Bailyn published his "General Introduction" to the *Pamphlets of the American Revolution*, this issue has remained at the centre of the historiographical treatment of the Revolution.[6] The idea of "power" as a threat to "liberty," he found, was not a new one to Americans in the middle of the eighteenth century, for it had existed—at least "in partial form"—in Anglo-American thought since the beginning of the century. Like many intellectual currents in provincial America, constitutional thought had a somewhat *retardataire* quality to it, and, while the ideology of opposition to centralized power waned in England, it remained in full force in America. Indeed—and we also have Bailyn to thank for this additional insight—the conditions of politics in the colonies produced a reality that gave meaning to the old ideology and propelled it forward. Provincial royal governors, possessing significantly greater legal powers than did the monarchy, consistently attempted to use those powers to expand their influence. Lacking, however, the patronage powers wielded by Walpolean parliamentary managers, they had to confront provincial politicians in a much more overt manner, pitting their executive powers openly against the constitutional powers of other governmental institutions.[7]

Resisting what Americans called such "encroachments" was thus the major factor conditioning the provincial understanding of constitutionalism. It was an eternal truth, John Adams believed, that "the love of power" "has always prompted the princes and nobles of the earth by every species of fraud and violence to shake off all the limitations of their power," and "it is the same that has always stimulated the common people to aspire at independence and to endeavor at confining the power of the great within the limits of equity and reason."[8] In a steady and consistent way, responding in an *ad hoc* manner to the various steps taken by royal governors to increase their "influence," provincial Americans gradually institutionalized their defensive habits and came to regard them as constituting the customary—and therefore guaranteed—elements of government. In short, such practices became what

6. B. Bailyn, ed., *The Pamphlets of the American Revolution, 1750-1776*, vol. 1: 1750-1765 (Cambridge, Mass., 1965) [hereinafter Bailyn *Pamphlets*]. This interpretation is set forth in Bailyn's general introduction, entitled "The Transforming Radicalism of the American Revolution." It was published in expanded form as *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967).
7. B. Bailyn, *The Origins of American Politics* (Cambridge, Mass., 1968), originally given as the Colver Lectures at Brown University in 1965 and first published in (1967), 1 *Perspectives in American History*.
8. J. Adams, "A Dissertation on the Canon and Feudal Law" (1774), in *Political Writings of John Adams*, ed. G. Peek, Jr. (New York, 1954), p. 4 [hereinafter Adams, Dissertation].

Adams meant by the term "our Constitution of civil Government."[9] Massachusetts Bay by 1774 may have had only seventy to eighty practicing lawyers, but that same year Adams was able to say that "we are all of us lawyers,"[10] for he well knew that participation in the process of thwarting "encroachments" was a process shared in widely by the inhabitants of the province through a variety of techniques and institutions.

On the most basic level, it might even be "extra-institutional," in the terminology of Pauline Maier, who has studied most closely behaviour once thought to be mere random mob violence. Throughout the eighteenth century provincial Americans used collective violence to check actions of the royal government that they regarded as illegal. Mob action was taken against naval impressment and customs enforcement, and it often had the tacit or even overt assistance of local officials. John Adams, for one, viewed such actions as "justifyed, in Opposition to Attacks upon the Constitution." So widespread and predictable had they become, in fact, that some in England could assert that "rioting is an essential part of our constitution," while in 1768 Thomas Hutchinson (then lieutenant governor and chief justice of the Superior Court of Judicature) confessed that "Mobs, a sort of them at least, are constitutional."[11]

Of more undoubted constitutionality were the practices of individuals to control the judicial process. Through a variety of devices they sought the "legal restraint of power" as a method of limiting the force exercised by governments generally.[12] A citizen aggrieved by town policy, for instance, had many avenues of challenging it through the courts. Since many powers of local government had to be enforced in court—not by the towns themselves, which lacked the institutions to do this—an arena in which to challenge town political powers was readily available. So, too, for the inhabitant who felt wronged by a perceived abuse of power and wanted to counter it: By claiming that the act of an official had been performed in such a way as to be actionable, he could sue in a common law action for damages.[13]

9. Adams, *Diary*, *supra*, note 2, vol. 2, p. 3.

10. J. Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts," in *Colonial America: Essays in Politics and Social Development*, ed. J. Murrin and S. Katz (3rd ed. New York, 1983), p. 540 at 554; Adams, Dissertation, *supra*, note 8, p. 12.

11. L.K. Wroth and H. Zobel, eds., *Legal Papers of John Adams*, 3 vols. (Cambridge, Mass., 1965), 1: 140 [hereinafter Adams, *Legal Papers*]. P. Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776* (paperback ed., New York, 1974), p. 24.

12. The term is best described by the person coining it, W. Nelson, in "The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as Case Study, 1760–1775" (1974), 18 A. J. Legal Hist. and expanded in the same author's *The Americanization of the Common Law* (Cambridge, Mass., 1975) [hereinafter Nelson, *Americanization*].

13. Nelson, *Americanization*, *supra*, note 12, p. 7.

Judges could not be controlled in this precise way, for they enjoyed an absolute immunity at common law for their official actions. Nevertheless, there existed ways to restrain them. The doctrine of precedent narrowed judicial discretion, and, in the approving words of John Adams, "left nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge." In addition, pleading was conducted in such a way as to bring cases under the general issue for the jury to decide, rather than under a special plea presenting a question of law that permitted a judge alone to decide the case. Juries assumed a large share of the courts' powers in this way and were not reluctant even to find law as well as fact. The instructions of judges sitting en banc could be contradictory, and, in the words of the scholar who has examined the process most ably, "brief and compressed," or not given at all. In sum, the provincial judiciary was very much limited by the reality of its situation; though not controlled by any formal, codified set of restrictions, they were nonetheless controlled by practice and procedure serving the same purpose.[14]

Legislators, too, were controlled by practice developed out of the habits of distrust toward government. Since the first establishment of representative assemblies in Massachusetts, legislators had been much more like advocates or agents than independent actors. The Massachusetts deputy was seen as the delegated agent of his constituency and was very often expressly bound to follow the will of his constituents through a system of written "town mandates." Should he fail to follow these clear instructions he might be summarily recalled in mid-session.[15]

Each of these arrangements—whether "extra-institutional," judicial, or political—was an element of the "Constitution of civil Government" in pre-revolutionary Massachusetts Bay. They were part of the unspoken understanding of law and constitutionalism well before the imperial crisis, and they developed without reference to parliamentary interference directed specifically at the colonies. By 1765 American law and constitutionalism would enter a new phase quite different from that of the earlier eighteenth century; the pre-revolutionary constitution as understood by provincial Englishmen in Massachusetts Bay would be

14. *Id.*, pp. 10–20. For a contrast with the English situation, where a judge "would provisionally refuse to enter a verdict that displeased him, reinstruct the jury, and require it to redeliberate," see J. Langbein, "The Criminal Trial Before the Lawyers" (1978), 45 *University of California at Los Angeles Law Review* 263 at 291–295. Although actual practice in England at that time conformed to Langbein's description, there existed at least a theoretical justification for a jury's independence. Blackstone—an unlikely advocate of American resistance to crown law, given his views on parliamentary omnipotence—boasted that English law was humane because juries might commit "pious perjury" to mitigate the rigours of the law. W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford, 1765–1769), p. 238.

15. K. Colegrove, "New England Town Mandates" (1919), 21 *Publications of the Colonial Society of Massachusetts, Transactions* 411 at 425.

subjected to new and different shocks, and resistance would be forced onto a much different plane—that of "natural law." But before that date the "Constitution of our civil Government" had little need of any but procedural guarantees. It is that particular body of procedures that this essay is attempting to understand. For much the better part of the eighteenth century they stood sufficient to protect American liberties, and it was in their defence that Americans first began to take serious exception to Acts of Parliament. These procedures have been called "whig law" as part of a peculiarly American constitution. The closest general study we have of them is a trilogy of books by John Phillip Reid. Though the subtitles of each of his three books on this subject refer to the "Coming of the American Revolution," Reid argues that by the middle of the eighteenth century Americans already had developed their own corpus of "whig law" and their own "constitution." From the American perspective these ideas were not at all new but were, instead, the hallowed products of the seventeenth century revolutions and embodied seventeenth century notions of a government restrained by custom. These principles eschewed the use of force in government and denied any innovations that equated "law" with "command" or "necessity." For the eighteenth century British Empire, on the other hand, law had to be founded on the will of Parliament. The gap between British and American notions was vast. By the middle of the eighteenth century Americans had developed, grown accustomed to, and implemented their own notion of what Reid calls "whig law," which was ancient and immemorial custom, "beyond the reach of historical memory," and "supported by most of the local institutions of government. . . ." For Americans, this "law" and the "constitution" were the same, and they were immutable. For the British, they were subject to the will of Parliament and might be changed as state necessity required.[16]

Reid's lawyerly exposition of the skilful use made of legal forms by Massachusetts Bay Whigs enlarges significantly our understanding of how law operated in pre-revolutionary New England. But if we now know *how* such Whigs protected their constitution, we still do not know precisely *what*, in a positive sense, were the fundamental prin-

16. Reid's books are *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (University Park, Pennsylvania, 1977) [hereinafter Reid, *Defiant Stance*]; *In a Rebellious Spirit: The Argument of Facts, the "Liberty" Riot, and the Coming of the American Revolution* (University Park, Pennsylvania, 1979); and *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (Chapel Hill, 1981) [hereinafter Reid, *Defiance*]. In 1923, C. McIlwain referred to this conflict as "one of the historical phases of the age-old antagonism between the ideas of law as truth and law as will" in *The American Revolution: A Constitutional Interpretation* (1923 orig. ed. New York, 1958), p. 46 [hereinafter McIlwain]. And, of course, in the thirteenth century Bracton, in his *De Legibus et Consuetudinibus Angliae* had described it as the difference between *gubernaculum* and *jurisdictio*.

ciples of law that they were protecting from "encroachment." Reid himself admits this problem in the most recent of his three books. Even if we know that Americans were protecting their own version of what law had been in seventeenth century England, he observes, "What law was in seventeenth-century England is today a harder question than what it was not."[17]

Indeed it is. There is no simple or unchallengeable answer, for procedures that limit are, by their very nature, more easily understood by what they exclude than by what they include. But perhaps there is a method that will move us toward a more complete understanding of what "law" meant and included. As a general term, "law" embodied certain things that gave it legitimacy and justified adherence to it. These legitimizing features were, on first examination, no less vague: They include ancient customary law, reason (according to St. German), "the perfection of reason" (according to Coke), the common law, fundamental law, or natural law, all of which were "engrafted into the British constitution."[18] By themselves, these terms do not move us any closer to an understanding of law and constitutionalism in pre-revolutionary Massachusetts Bay. But it is proposed here to examine the term "constitution" through its specific and purposeful use in the courtroom to see what positive idea or institution it was protecting rather than simply accepting its use to define what it was not.

This method involves the close examination of the text and context of a particular case—for the present purposes, James Otis' argument in the famous "Writs of Assistance" case of 1761. A particular case presents major methodological advantages. In the first place, a legal argument involves a precision of language and terminology not always found in polemical tracts written to arouse a mass public. In addition, the rules of common law pleading were strict and closely governed how a case was to proceed. Judges, though they may not have been able actively to push a case toward the end they sought, were not absolutely passive either, and they had some defensive tools of their own. One was the power to halt a particular line of argumentation that displeased them. If Tory or otherwise sympathetic to the crown, they might do as Judge John Cushing did in 1766 to John Adams. "He interrupted me," Adams recalled, "—stopped me short, snapd me up.—'Keep to the Evidence—keep to the point—dont ramble all over the World to ecclesiastical Councils—dont misrepresent the Evidence.'" Thomas Hutchinson, the chief justice presiding at the Superior Court hearing on granting the writs of assistance in 1761, did the same to Adams in 1769 when Adams tried to raise the issue of "the Law of Nature" in another trial. Abruptly stopped by the chief justice, Adams later remarked,

17. Reid, *Defiant Stance*, p. 66; Reid, *Defiance*, p. 47, *supra*, note 16.
18. McIlwain, *supra*, note 16, p. 149.

"Never in my whole life have I been so disappointed, so mortified, so humiliated as in that trial."[19] Finally, because we know that common law pleading was so precise as to be stultifying, we also know that points of argument could be made on extremely narrow grounds to achieve equally narrow results. Such a fact enables us better to understand what Quentin Skinner calls "the *use* of the relevant sentence by a particular agent on a particular occasion with a particular intention (*his* intention) to make a particular statement."[20]

The case of the writs of assistance suits these needs well.[21] It does so because in it Otis, as principal attorney, and Oxenbridge Thacher, as co-counsel, addressed themselves directly to the issue of what was, as well as what was not, constitutional. In Otis' words, as recorded by John Adams,

> This Writ is against the fundamental Principles of Law. The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle. . . .

Otis, more specific, added,

> As to Acts of Parliament. An Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very words of this Petition, it would be void. The executive Courts must pass such Acts into disuse. 8 Rep. 118. from Viner. Reason of the Common Law to control an Act of Parliament.[22]

More than half a century later, in a letter of 29 March 1817 to his old colleague William Tudor, Adams reflected on this episode and commented that "then and there the child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, declared himself free."[23] Since Adams was referring to Otis' argument about statutes contrary to the constitution being void, and since the newly independent states in the 1780s drafted firm substantive limits on legislation, it has been well nigh impossible to resist interpreting Adams' observation as an indication that Otis was making the first declaration of what later was embodied in the American Constitution and Bill of Rights as "substantive due process."

But too much should not be read into Adams' recollection, and it

19. Adams, *Diary, supra*, note 2, vol. 1, p. 335; P. Shaw, *The Character of John Adams* (New York, 1876), p. 62.
20. Q. Skinner, "Meaning and Understanding in the History of Ideas" (1969), 8 *History and Theory* 3 at 37 [hereinafter Skinner].
21. Petition of Lechmere (1761), most fully available in Adams, *Legal Papers, supra*, note 11, vol. 2, p. 106.
22. *Id.*, p. 127.
23. J. Adams, *The Works of John Adams, Second President of the United States*, 10 vols., ed. C. Adams (Boston, 1850-1856), 10:248 [hereinafter Adams, *Works*].

should not be taken out of context. Few historians quote the entire sentence mentioning the "child Independence" (with its implicit distinction between childhood and maturity), and fewer still observe that in his letter he made no mention of the legal arguments of that day in court. However, Adams did address those legal arguments in a later and less celebrated letter to Tudor. Turning to the law on 6 August 1818, Adams recalled that the point of law being argued was not any higher law but rather the narrow question of whether the Massachusetts Bay Superior Court of Judicature "had all the powers of the exchequer in England, and consequently could issue warrants like his Majestys court of exchequer in England." The point was one of procedure, not the substance of the law, and the problem was one of interpreting statutes. As he explained to Tudor in apology for quoting so extensively from the wordy and convoluted statutes in question, "However tedious and painful it may be for you to read, or me to transcribe any part of these dull statutes, we must endure the task, or we shall never understand the American Revolution."[24]

It is not only improper readings of Adams' remarks that have led scholars astray in interpreting what Otis was saying in 1761, for Otis himself contributed to the problem with his pamphlet of three years later, *The Rights of the British Colonies Asserted and Proved.* There, it is more clear that Otis was referring to the more modern doctrine of a higher law, a body of substantive principles, nullifying statute. Some caution, however, is in order, for whatever Otis wrote in 1764 can not be extrapolated back in time to 1761. Obviously, there is a great difference between a courtroom pleading and a widely distributed political treatise. The distinction is not merely an academic one limited more to rhetoricians than to constitutional scholars. Even if it were, Otis must be seen as belonging to both groups. In 1760 he published his first work, entitled *The Rudiments of Latin Prosody with a Dissertation on Letters and the Principles of Harmony in Poetic and Prosaic Composition.* Well aware of rhetorical convention, he knew and obeyed the rule that certain styles of argument suited particular needs and were out of place elsewhere. When he published his *Vindication of the Conduct of the House of Representatives of the Province of the Massachusetts Bay* in 1762, he took note of the difference between two different styles of argument analogous to the difference between addressing the public and addressing the court:

> It may not be amiss to observe, that a form of speech may be, in no sort improper, when used *arguendo*, or for illustration, speaking of the King, which same form might be very harsh, indecent, and even ridiculous, if spoken to the King.[25]

24. *Id.*, pp. 338-343.
25. J. Otis, *Vindication*, p. 25.

Regardless of convention, much had changed between 1761 and 1764. By the latter date Parliament had removed any doubt about the enforcement of customs regulations when it passed the Sugar Act, providing for trial of offenders by civil law at a vice-admiralty court in Halifax.[26] More ominous yet was talk of raising a direct revenue from the colonies through statutes enacted without colonial representation. Newly injected into the struggle were the issues of taxation, representation, and trial by jury; together, these called into question the most basic rights of the Americans as British subjects. No longer would procedural protections suffice to protect rights that were being explicitly abrogated in the statutes, and for this reason Otis included in the 1764 treatise a section "Of the Natural Rights of Colonists."[27]

Hence, while it is correct to refer to Otis' 1764 position as including natural or higher law philosophy,[28] it is much less accurate to refer to his 1761 pleading as "'higher law' in something like the sense used by modern constitutional theorists."[29] Such an attribution of ultimate historical significance to an early statement suggests what is known as the fallacy of "prolepsis" in which the later significance of an idea is confused with its actual content and with the actual intention of the person using it at a particular time for a particular purpose.[30] Had Otis been making such a "higher law" argument in 1761, it is highly unlikely that his opposing counsel—and former teacher—Jeremiah Gridley would have seemed quite as pleased as he did with Otis' performance. According to John Adams' reminiscence,

> It was a moral spectacle, more affecting to me than any I have since seen upon any stage, to see a pupil treating his master with all the deference, respect, esteem, and affection of a son to a father, and that without the least affectation; while he baffled and confounded all his authorities, and confuted all his arguments and reduced him to silence.

Adams described the reaction of the conservative, traditional Gridley in the following words: "Mr. Gridley seemed to me to exult inwardly at the glory and triumph of his pupil."[31]

In short, Otis did not intend to assert, nor did his listeners infer, any radically new "higher law" argument in 1761, for such ideas were not

26. 4 Geo. 2, c. 15.
27. J. Otis, *Rights*, p. 436, printed in full, with original pagination, in Bailyn, *Pamphlets, supra*, note 6. On the sharp change in constitutional debate occurring at this time, see D. Lovejoy, "'Rights Imply Equality': The Case Against Admiralty Jurisdiction in America, 1764-1776" (1959), 16 *William & Mary Quarterly*, third series, 459.
28. Bailyn, *Pamphlets, supra*, note 6, pp. 100-102, 412.
29. Adams, *Legal Papers, supra*, note 11, vol. 2, p. 119.
30. On prolepsis, see Skinner, *supra*, note 20, pp. 23-24.
31. Adams, *Works, supra*, note 23, vol. 10, pp. 327, 343.

needed then. Even a year later, in the contest between the House and the governor over the latter's appropriation of funds without legislative approval, Otis did not use them. Such an action of the governor, he wrote, "In the nature and reason of the thing, should seem to be limited by some usage or custom, if not by something more explicit."[32] While all proofs of this sort are circumstantial, they do at least show that the context of, and response to, his arguments suggest their non-radical quality. Rather, it is submitted here, Otis' arguments were so positively and broadly supported in 1761, and his popularity "without bounds," precisely because they were not radical. The great and nearly uniformly enthusiastic reaction of the Boston community in 1761, especially seen in contrast to the divided and confused reaction to his pamphlet in 1764, suggests that Otis was tapping the deep tradition of jealously guarded constitutional protections as provincial Bostonians saw them. Neither Otis nor Adams was yet ready for an innovative argument in 1761. Had Otis made such a plea at that point, Gridley or Hutchinson would have noticed and remarked on it.[33]

The suggestions from external evidence are supported by an examination of the internal evidence of the text of the arguments themselves. That inquiry goes far toward revealing the essentials of pre-revolutionary constitutionalism and the common fund of understanding about law held by mid-century Americans. To do so, the inquiry must analyze the text in its own time and place, understanding the conventions of language of the time, and seeing the text as having been produced for specific targets. At the centre of the case was the legality of general search warrants. These writs of assistance were to give effect to statutes of 1660, 1662 and 1696 enforcing the navigation Acts.[34] Unlike special warrants, they were not limited by time or by a designation of a place to be searched. Five such writs had been issued in Massachusetts Bay between 1755 and 1761, but their legality remained an open question. Thomas Hutchinson, who as lieutenant governor and chief justice of the Superior Court of Judicature would uphold their legality in the 1761 case, had advised Governor William Shirley in the 1750s that they were probably illegal, but Shirley had issued them nonetheless, and they remained unchallenged throughout the decade. But the writs did

32. J. Otis, *Vindication*, p. 31.

33. On Otis' popularity in 1761, see Adams, *Works*, *supra*, note 23, vol. 10, p. 248. On the response to *Rights of the British Colonies*, see Bailyn, *Pamphlets*, *supra*, note 6, pp. 409–410.

34. Acts of 1660 (customs search warrants, 12 Car. 2, c. 19) and 1662 (power of entry "for preventing frauds and regulating abuses in His Majesty's Customs" 13 & 14 Car. 2, c. 11) did not mention the colonies and thus did not extend there. These provisions were extended there by an Act of 1696 ("for preventing frauds, and regulating abuses in the plantation trade" 7 & 8 Will. 3 c. 22). "Writs of assistance" were known as such because of the authority given in them to customs officials to command aid in their execution.

not last forever; issued in the name of the reigning monarch, they ran only until six months after his death. With the passing of George II in 1760, the writs would need renewal. In 1761, however, the merchants of Boston were not to be as acquiescent as they had been, and James Otis took on their case to argue against their issuance. Maintaining that the writs were illegal, he argued that they ought not be granted as sought by the petition of Thomas Lechmere, surveyor general of customs.[35]

Otis' arguments are far more famous than those of his co-counsel in the case, Oxenbridge Thacher. Yet because Otis' points must be seen as one element in the context of a general mid-eighteenth century constitutionalism, Thacher's arguments also demand examination. According to him, "The most material Question is, whether the Practice of the Exchequer, will warrant this Court in granting" the writs. His point was that the statute requiring the writs specified that they be granted by an exchequer court, while in Massachusetts Bay no such court existed. The Superior Court of Judicature, which had been requested to issue the writs, had renounced its exchequer jurisdiction.[36] But Thacher was not making only a jurisdictional point; behind the question of jurisdiction was another one that turned on procedure. In England, he noted, the writ was returnable. Because the officer executing the process was later required to certify his doings before the court, proper use of the writ was supervised by the court. In Thacher's words, "the Custom House officers are the officers of that Court," and thus "Under the Eye and Direction of the Barons [of Exchequer]." The Massachusetts Bay writs, by contrast, were not to be returnable. As a result, mid-century constitutional theory held that abuses were inevitable without procedural accountability. If the Superior Court could see how they were being used without accountability, and "If such seisure were brot before your Honours," he said, "youd often find a wanton Exercise of their Power."[37]

The "wanton Exercise of Power": Thacher's attack on the lack of procedural accountability touched a central aspect of contemporary constitutionalism. It is important to emphasize this fact because it was through duly followed procedure that mid-century Americans saw their rights declared and enforced. Without having any firm sense of substantive, absolute bars to protect the individual against the state, they saw their protections in procedure. Put in terms more familiar to the eighteenth century, "the remedy comes before the right." Without a remedy

35. J. Quincy, ed., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772* (1865, orig. ed. New York, 1969), pp. 405–406. See note 21, *supra*.

36. The Court had done so in 1754 in *McNeal* v. *Brideoak*. On this case and Thacher's use of it, see M. Smith, *The Writs of Assistance Case* (Berkeley, 1978), p. 302 [hereinafter Smith]. This book is the definitive factual account of the case.

37. Adams, *Legal Papers*, *supra*, note 11, vol. 2, pp. 124–125.

there is no right, for "right" was a legal term existing in reference to a remedy that guaranteed it or obtained damages for its loss.

Otis followed Thacher and wasted no time in addressing the point he saw as material: "This writ is against the fundamental Principles of Law." He then explained that this meant "The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle, not with standing all his Debts, and Civil Prossesses of any kind." Otis was careful to add that there were limitations on this "Priviledge": "flagrant Crimes, and in Cases of great public Necessity," or "For Felonies an officer may break upon Process, and oath—i.e. by a Special Warrant to search such a House, and sworn to be suspected, and good Grounds of suspicion appearing."[38]

The principle identified here as "fundamental" and thus inviolable by statute is the famous guarantee that a man's house is his castle. But it must be asked whether Otis saw it as an inviolable "natural right," and what he knew about it from his legal background. These are the sort of questions that must be asked if modern scholars are to understand accurately the historical meaning of the term and thereby the way in which Acts became "unconstitutional."

The principle as stated in that form came from *Semayne's Case* (1605),[39] where Sir Edward Coke wrote, "That the house of every one is to him as his castle and fortress, as well as his defence against injury and violence, as for his repose." The facts in this case concerned a sheriff attempting to seize from the house of a defendant property to be appraised before delivery to a plaintiff. When the sheriff arrived at the house, the defendant shut his door, whereupon the sheriff broke it in order to extend (seize for appraisal) the goods. The law in this case, upon which the decision turned and which defined the right, was a point of procedure: quite simply, the sheriff had failed to request that the door be opened, and his failure to observe due or proper process was therefore a wrong. Before a sheriff breaks a door, in Coke's words, "he ought first to signify the cause of his coming, and make request to open the doors." Proper procedure was necessary to prevent "great damage and mischief" or "inconvenience." Coke continued, "But the great question" of this case was whether a sheriff, after request and denial, could force a door to serve execution. On this there was no doubt: If he were serving the King's process (as for felony or misdemeanor) and made proper notice of his coming and requested entry, he could not be resisted.[40]

Of course, it could be argued that Otis, a provincial lawyer far from the Inns of Court and the central courts at London, had only an imperfect acquaintance with *Semayne*; accordingly, he might have been

38. *Id.*, pp. 125–126.
39. 5 Co. Rep. 91.
40. *Id.* at 93.

familiar only with the general maxim but not with the case in all its points and, therefore, simplistically elevated the qualified statement into an absolute. However, internal evidence suggests otherwise—namely, that Otis was familiar with all the facts, holdings, and dicta in the case. The evidence is a similar point made by both Coke and Otis; it was a minor point in *Semayne*, and easily overlooked, but it was a factual situation that fitted the Boston reality of 1761 and gave meaning to the 1605 case. Coke had noted the need for proper procedure because "great inconvenience" could result when lowly officers ("persons of little substance") serve process in private suits. Whereas a sheriff, being a man of substance, was presumed by Coke to be beyond the abuse of law, a base individual such as a bailiff was not presumed to respect due process; he might serve process improperly, for example, at night or when the defendant was not at home. This point is central to Otis' argument, where he warned of the abuses that would occur when the writs would be handed around among the most venal and corrupt petty officials abounding in mid-century Boston. Otis warned that "even THEIR MENIAL SERVANTS ARE ALLOWED TO LORD IT OVER US—What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of GOD'S creation."[41]

For many years the received wisdom about Otis' argument was that it asserted the existence of a body of principles existing above statute and limiting it. This reasoning was based on Otis' citation of Coke's statements in *Dr. Bonham's Case* which, Otis said, obliged the "executive courts" to declare void statutes that violated the constitution. It is no longer general historical opinion to regard Coke's statement as leading to modern constitutional notions of judicial review. Since 1938 there has been much weight to the interpretation of *Bonham* showing that Coke was making no such modern argument but was rather only construing the law in such a way as to make it conform to the common law and not violate it—in particular, that the statute should be construed so as to avoid the dangerous procedure of making a man a judge in his own cause.[42] Otis was making the same point with *Bonham* and also did so when he took language very directly from another seventeenth century case, that used by Lord Hobart in *Day* v. *Savadge*.[43] Otis, it should be remembered, argued that "an Act against natural Equity is void." Hobart's opinion was based on the same principle of procedure used by Coke in *Bonham*, which case Hobart cited directly; namely, that the Act on which the suit was based in *Day* made a man a judge in his own cause. In Hobart's words, "Even an act of Parliament,

41. Adams, *Legal Papers, supra*, note 11, vol. 2, p. 142.
42. S. Thorne, "Dr. Bonham's Case" (1938), 54 L.Q. Rev. 543.
43. (1614), 80 E.R. 235.

made against naturall equitie, as to make a man a judge in his own case, is void in it selfe. . . ."[44]

To demonstrate the traditional and non-revolutionary character of Otis' position, it is necessary to emphasize the procedural nature of the protections Americans sought against arbitrary government. The main burden of Otis' argument was one of construction. The general warrant was authorized, Lechmere had petitioned, by the statute of 1662 which had augmented the powers of search granted by the statute of 1660.[45] According to Otis, who was once again relying on the power of a court to interpret statutes so as to make them conform to the common law, the earlier statute had authorized only special warrants, not general ones. The principles of common law statutory interpretation required that statutes be consistent; therefore, the vague words of the latter statute had to be construed consistent with "natural equity," a term familiar to common lawyers. It referred neither to abstract principles of fairness nor to a body of substantive law. Rather, it referred to the doctrine of the "equity of statutes," a method of statutory interpretation. This was an old doctrine, fading fast in seventeenth century England, and it would be virtually eliminated as the doctrine of parliamentary omnipotence grew in the eighteenth. But it had a long pedigree, and Otis, drawing on seventeenth century notions of law and the constitution, was using it in 1761. The rules governing the interpretation of statutes required that positively worded statutes (such as the Act of 1662) were to be construed as operating consistent with existing statute law (the Act of 1660). Such is all that Otis was demanding here by the term "natural Equity," namely, that the court take the wording of the 1662 statute and, as Lord Hobart had said, "mould them to the truest and best sense."[46]

Otis repeatedly cited the procedural flaws in the system of general warrants. They were, for one thing, "UNIVERSAL," so that "everyone with this writ may be a tyrant." They were also "PERPETUAL," and there was no requirement that they be returned; echoing Thacher's point about the lack of accountability, he warned that "every man may reign secure in his petty tyranny, and spread terror and desolation around him, until the trump[et] of the arch angel shall excite different emotions in his soul." Moreover, the bearer of the writ could enter houses "AT WILL" during the day and "command all to assist" him in his tyranny.[47]

The case at hand, then, turned on what Otis, speaking in the

44. *Id.* at 237.

45. See note 34 *supra.*

46. J. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1961), p. 19. T. Plucknett, *Concise History of the Common Law* (London, 1956), p. 50. On the seventeenth century quality of Otis' "conceptions of power and law that had promoted the cause of liberty in the age of Edward Coke," see Bailyn, *Pamphlets, supra,* note 6, p. 551.

47. Adams, *Legal Papers, supra,* note 11, vol. 2, p. 142.

commonly understood conventions of eighteenth century constitutionalism, called "this wanton exercise" of power, "this monster of oppression." Rather than defending liberty against such a "monster" with the invertebrate creature of natural law or abstract principle, Otis had explicit and well-understood rules to show that "reason and construction are both against this writ." These qualities were among the basic principles of the constitution, and "AN ACT AGAINST THE CONSTITUTION IS VOID." He emphasized, "ALL PRECEDENTS ARE UNDER THE CONTROUL OF THE PRINCIPLES OF THE LAW," or, as he elsewhere referred to them, "the fundamental Principles of Law." Though it is possible to suggest that these "fundamental Principles" could mean the modern idea of judicial review, Otis' remarks seen in context indicate that he meant the fundamental principles of construction, interpretation, and procedure. All of his citations, he stated in his summation, "prove no more than what I before observed, that *special* writs may be granted *on oath and probable suspicion.* The Act of 7th and 8th of William III. [1696] that the officers of the plantations shall have the same powers, &c. is confined *to this sense. . . .*"[48]

A final, and very important, problem remains: what did Otis mean by "void," and how were the "executive Courts" actually to "pass such Acts into disuse"?[49] The answer, it is submitted here, lies not in any early version of judicial review, but rather in the details of how the legal system functioned in eighteenth century Massachusetts Bay. Thacher, in his argument, hinted at the answer when he argued that the writs of assistance were not of that category of writs which a court was required to issue upon demonstration of certain circumstances. There existed other writs relating to the executive capacity of the court which (in the words of the scholar who has studied this facet of the case most carefully) "were issued or not as the court thought fit."[50] Thacher believed that the writ of assistance fit neither category precisely, but he may have been arguing that because it did not fit the former it should not be issued. It is also important to note that the category of discretionary writ—those that the court could issue or not as it saw fit—related to the *executive* functions of the court, with the sheriff serving process.[51] This functional aspect of justice, then, is to the point: that the court could

48. *Id.*, pp. 143-144 (emphasis added).
49. *Id.*, p. 128.
50. Smith, *supra*, note 36, pp. 401-402.
51. John Adams even described the jury as being responsible for "the Execution of the Lawes": Adams, *Diary, supra*, note 2, vol. 2, p. 3. The courts of provincial Massachusetts Bay had many functions that today would not be regarded as strictly judicial but, rather, executive and administrative. On this undifferentiated quality of those courts, see H. Hartog, "The Public Law of a County Court: Judicial Government in Eighteenth-Century Massachusetts" (1976), 20 *American Journal of Legal History* 282.

simply refuse to execute a law that it regarded as unconstitutional. This refusal to execute fits very well with the tradition of justice in Massachusetts Bay, where process was more important than doctrine. Nor is this judicial stance without common law precedent; Coke spoke of it when he noted that "the law will not suffer those things to be aided or maintained by the countenance of law, which appear to the court to be void, against law, or insufficient. . . ." In such a situation, he wrote, "no aid shall be granted."[52] It is a less well-known fact of the entire episode surrounding the writs of assistance that, before the case came to Boston, customs officials made application to the Inferior Court of Common Pleas at Swansea for a general writ of assistance. The judges there declined to issue them, explaining, "We thought it not Incumbent on us by the Common Law if not Repugnant to it."[53] What they were saying was consistent with what Thacher had argued; namely, that the court need not issue the writ if it did not see fit to do so. In Coke's words, the court would grant "no aid"; in Otis' words, they would effectively "pass such Acts into disuse."

The lack of express authority of non-exchequer courts to issue writs of assistance was so troubling to crown officials that they finally asked attorney general William deGrey (later Lord Walsingham and chief justice of Common Pleas) for his opinion on the matter. Interpreting the existing statutes, he reported that giving colonial customs officials general warrants was not founded in law. So informed, Parliament in 1767 enacted a statute which stated the following:

> no authority being expressly given by the said act [7 and 8 Gul. 3] . . . to any particular Court to grant such Writs of Assistants for the Officers of the Customs in the said Plantations, it is doubted whether such Officers can legally enter Houses and other Places on Land, to search for and seize Goods, and in the manner directed by the said recited acts; To obviate which Doubts for the future, and in order to carry the Intention of the said recited Acts into effectual Execution, be it enacted, and it is hereby enacted by the Authority aforesaid, that from and after the said [20 November 1767] such Writs of Assistants . . . shall be and may be granted by the Superior or Supreme Court of Justice having Jurisdiction within such Colony or Plantation respectively.[54]

Nonetheless, though such courts were explicitly empowered to do so, they did not regard themselves as required to do so. Courts in every

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52. Sir Edward Coke, *Second Part of the Institutes of the Lawes of England* (London, 1642), p. 248.
53. J. Frese, "James Otis and Writs of Assistance" (1957), 30 *New England Quarterly* 496 at 502.
54. *Id.*, p. 506 (7 Geo. 3, c. 46).

colony—whether Whig Massachusetts Bay or Tory Nova Scotia—refused to issue them.[55] Their reasoning was devoid of the flamboyance of James Otis, but firmly grounded in the procedural constitutionalism of the eighteenth century North American colonies.

55. O. Dickerson, "Writs of Assistance as a Cause of the American Revolution, in *The Era of the American Revolution*, ed. R. Morris (1959 orig. ed. New York, 1965), p. 40, at pp. 59-61.